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No. 41

In the Supreme Court of the United States

OCTOBER TERM, 1947

THE UNITED STATES OF AMERICA, APPELLANT

v.

SCOPHONY CORPORATION OF AMERICA, GENERAL PRECISION EQUIPMENT CORPORATION, TELEVISION PRODUCTIONS, INC., PARAMOUNT PICTURES, INC., SCOPHONY LIMITED, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court (R. 58–63) is reported in 69 F. Supp. 666.

JURISDICTION

The judgment of the district court granting the motion of Scophony, Limited, to dismiss the complaint and to quash service of process as to it was entered on November 8, 1946 (R. 66–67). Petition for appeal was filed and allowed on

January 7, 1947 (R. 67–68). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. 345. Probable jurisdiction was noted on March 10, 1947 (R. 265).

QUESTION PRESENTED

Whether an alien corporation is "found" within a federal judicial district, so that it may be sued and served with process in an antitrust proceeding brought against it in the district, when it (a) has entered into an agreement, violative of the federal antitrust laws, with two American companies doing business in the district, providing for the continuing exploitation of patents and inventions owned by it; (b) has, together with those American companies, formed a domestic corporation, doing business in the district, to license its patents, in which corporation it controls a majority of the directors and officers; and (c) has engaged through its agents (including its representatives on the domestic corporation's board of directors) in promoting the exploitation of its patents and inventions in the district.

STATUTE INVOLVED

Section 12 of the Act of October 15, 1914, 38 Stat. 736, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

STATEMENT

This case is here on appeal from an order of the district court entered in a proceeding brought against defendant Scophony, Limited, and others charging violation of Sections 1 and 2 of the Sherman Act. The court dismissed the complaint as to defendant Scophony, Limited, and quashed service of process on it upon the ground that it was not found within the jurisdiction (R. 58–63, 66–67).

Scophony, Limited (herein called "Limited"), is a British corporation organized and existing under the laws of the United Kingdom, with offices and principal place of business in London, England (R. 4). Limited manufactures and sells television apparatus and is the owner and licensor of inventions covering, among other fields, tele-

vision reception and transmission (*ibid.*). Prior to 1939, Limited had obtained control of inventions and patents relating to two novel systems of television transmission and reception, one known as the "supersonic" system and the other as the "skiatron" system (R. 5–6). The present and future patents, patent applications, patent rights, inventions, designs, processes, techniques, technical data and information relating to these two systems are herein referred to as the "Scophony Inventions". Limited has taken out patents on the Scophony Inventions in the United States and other parts of the Western Hemisphere, and also in the Eastern Hemisphere (R. 53, 57, 122, 196, 256).[1]

The outbreak of the European war in 1939 made it impossible for Limited to engage in the commercial development, manufacture and sale of television equipment in England (R. 6, 50, 159, 191). Limited accordingly sent personnel to the United States for the purpose of encouraging the exploitation of the Scophony Inventions in this country (R. 50). It also sent television equipment to this country; maintained an office in New York City from 1940 to 1941; demonstrated its

[1] The terms Western Hemisphere and Eastern Hemisphere are used herein in the sense in which Limited and other defendants used them in agreements made with each other, namely, that the continents of North and South America, plus the Philippine Islands, roughly constitute the Western Hemisphere and the rest of the world constitutes the Eastern Hemisphere (R. 20, 31).

equipment there; and leased a television set to a theatre company, as a result of which a set was installed in the Rialto Theatre in New York City (R. 50–51, 60).

On the basis of the foregoing facts, the district court concluded that "Limited was actively engaged in placing its product in the American market," and that its business in 1940 and 1941, and perhaps for part of 1942, "was of such a character that one might very well infer that it had subjected itself to the local jurisdiction and was present here at that time by its duly authorized agents upon whom service of process could be made" (R. 60). The court, however, decided that Limited was not present within the jurisdiction on December 20, 1945, or April 5, 1946, when process in the present suit was served on Limited by respectively serving two of its directors (R. 63, *infra*, p. 11). With reference to this determination, which we contend is erroneous, the following facts are pertinent.

By the latter part of 1941 Limited found itself in financial distress with respect to its American operations because restrictions by the British Government on the export of currency made it difficult, if not impossible, for Limited to send additional funds to its representatives in the United States (R. 6, 51). Limited had entered into financial obligations on which it was being sued by some of its creditors in New York City

and, in these circumstances, arrangements for supplying the enterprise with new capital from American sources became imperative (R. 6, 51–52). In October 1941 Arthur Levey, a director of Limited, began negotiations with two of the dominant companies in the motion picture field, Paramount Pictures, Inc., and General Precision Equipment Corporation (R. 52). Levey's negotiations with these companies led to the execution of the so-called Master Agreement of July 31, 1942, and the agreements supplemental thereto executed on August 11, 1942, which provided for paying off Limited's American creditors (*ibid.*).

Paramount Pictures, Inc., is a New York corporation, with an office and place of business in New York City, engaged in the motion picture business. Through its wholly-owned subsidiary, Television Productions, Inc. (hereafter referred to as TPI), a California corporation with an office and place of business in New York City, Paramount also engages in the ownership and operation of television broadcasting stations. General Precision Equipment Corporation (hereafter referred to as GPE), a Delaware corporation with offices and principal place of business in New York City, is in its own right one of the largest manufacturers of motion picture theatre equipment in the United States. In addition, a subsidiary of GPE, International Projector Corporation, is the largest United States manufacturer of motion picture projectors. GPE itself

is the largest single stockholder in Twentieth-Century-Fox Film Corporation, on whose board of directors it has three members (R. 4).

The Master Agreement of July 31, 1942, entered into among Limited, GPE, and TPI, provided for the formation of a new corporate entity, Scophony Corporation of America (hereafter referred to as "SCA"). SCA was to be a Delaware corporation with an authorized capital of 1,000 Class "A" shares and 1,000 Class "B" shares. Limited was to be given the 1,000 Class "A" shares, which conferred the right to elect three of SCA's five directors and its president, vice-president and treasurer. GPE and TPI were allotted the 1,000 Class "B" shares, and, by virtue of such ownership, were entitled to elect the two remaining directors and the secretary and assistant secretary of SCA. The Master Agreement set forth the names of the individuals who were to be elected directors and officers of the corporation about to be created, and Levey, a director of Limited, was named therein as the president and a director of the contemplated corporation (R. 15, 61).

SCA was not a party to the Master Agreement of July 31, 1942, but it was a party to two supplemental agreements, executed on August 11, 1942, which were attached to the Master Agreement and which the parties to the Master Agreement bound themselves to enter into (R. 15–17). One of the

August 11 agreements was entered into between Limited and SCA only, but provided that GPE and TPI could enforce, in their own names or that of SCA, all rights, benefits and causes of action arising thereunder (R. 29–30). This agreement provided for the sale and transfer by Limited to SCA of all its right, title and interest in the Scophony Inventions within the Western Hemisphere, and for the exclusion of any other person from access to those inventions (R. 21–23, 61). Royalties for the use of the Scophony Inventions were to be paid by SCA in New York to Limited or Limited's agent, in New York funds (R. 28). SCA agreed to transmit to Limited all technical data and information used or useful in connection with the Scophony Inventions and bound itself not to take out any patents in the Eastern Hemisphere (R. 23). In addition, SCA gave Limited an exclusive sublicense for the Eastern Hemisphere only, without the right further to sublicense, under inventions, designs, processes and techniques covered by television patents and patent applications licensed to it by GPE and TPI (R. 23, 36, 37). SCA also gave Limited an exclusive license for the Eastern Hemisphere, with full rights to sublicense, under patent rights acquired from any other person (R. 24). Finally, under the terms of the agreement, Limited promised not to make, use, or sell television equipment or apparatus, involving the

Scophony Inventions or any inventions or information licensed to it or given it by SCA, for export anywhere within the Western Hemisphere (R. 26).

The other agreement of August 11, 1942, was a patent license agreement under which SCA gave GPE and TPI, respectively, exclusive licenses for the Western Hemisphere under the Scophony Inventions, but without the right to sublicense. The only power of future licensing reserved by SCA for itself was in connection with television broadcasting stations, but even that narrow power could be exercised only if GPE and TPI gave their consent or if SCA acquired 40% of the stock of the proposed licensee (R. 31–32). SCA agreed to transmit to GPE and TPI promptly all technical data and information used or useful in connection with the Scophony Inventions which it received from Limited (R. 33). GPE and TPI were to pay their royalties in New York funds (R. 34, 36). Likewise payable in New York funds were the royalties payable to GPE and TPI in connection with Limited's exclusive license for the Eastern Hemisphere under GPE and TPI inventions (R. 37). Furthermore, SCA agreed that it would not permit Limited or anyone else to export to the Western Hemisphere any product embodying the Scophony Inventions or the inventions licensed to SCA by GPE or TPI (R. 39). GPE and TPI, in turn, agreed not to export to

the Eastern Hemisphere any television equipment or product embodying any of the Scophony Inventions (*ibid.*).

The Master Agreement of July 31, and the two implementing agreements of August 11, were entered into in New York and were, by their terms, to be construed in accordance with the laws of New York State (R. 17, 29, 42). They constituted practically the entire basis of the present proceeding, brought by the United States on December 18, 1945, against Limited, SCA, GPE, TPI, Arthur Levey, and two other individual defendants (R. 4–5). The three agreements were described in the Government's complaint (R. 7–11) and were attached to it as exhibits (R. 14, 19, 30). The complaint charged the defendants with conspiring to restrain and monopolize interstate and foreign commerce in products, processes, patents and inventions useful in television and allied industries, in violation of Sections 1 and 2 of the Sherman Act (R. 7). It was alleged that the effects of this conspiracy were a territorial division of the manufacture and sale of television products between Limited, to which was assigned the Eastern Hemisphere, and GPE and TPI, to which were assigned the Western Hemisphere; the suppression and restraint of competition in the manufacture and sale of television apparatus and equipment, both on the domestic and export side; and the acquisition by GPE and

TPI of monopoly power over the Scophony Inventions and products embodying those inventions, which enabled them to suppress the exploitation of those inventions and to deprive others of their use (R. 12–13).

Service of process as to Limited was made by delivering to Arthur Levey in New York City on December 20, 1945, a copy of the complaint and a summons directed to Limited (R. 43). A copy of the complaint and a like summons directed to Limited was served in New York City on April 5, 1946, upon William George Elcock, who was financial comptroller and a director of Limited (R. 44). At the time of said service Levey was residing in New York City (R. 16) and Elcock was travelling in this country in connection, in part, with the interests of Limited (R. 46, 48). Following service on Elcock, he was examined, pursuant to court order, in the presence of counsel for all of the defendants (R. 70–71, 139, 165).

Elcock was not only a director of Limited (R. 49, 91) but was also mortgagee of all of Limited's assets by virtue of having loaned it a considerable sum of money (R. 14, 19, 49, 72, 74, 158, 234, 235). In addition, Elcock was financial comptroller of Limited under a financial comptroller's agreement which he himself described as one that gave him "the power to deal with finance, decide on what shall be manufactured, and dictate the general policy of the company, subject always to

the approval of the Board" (R. 76, 49, 75, 97, 140–142, 167).[2]

At the time of service of process on him, Elcock held a comprehensive power of attorney from Limited, dated March 14, 1946, empowering him, as a director, to investigate the affairs of SCA and to adjust the impasse that had arisen between the representaives of Limited, and those of GPE and TPI, on SCA's board of directors (R. 97, 99). The specific authorizations conferred by this power of attorney covered such a wide range (R. 244–245) as to justify Elcock's admission that it gave him "full power to do anything that I may decide in connection with the affairs of Scophony, Ltd., as applicable to their American investment" (R. 223). Elcock was specifically authorized, among other things, to commence and prosecute all suits, actions, and proceedings necessary to conserve the interests of Limited in the United States, and to defend any actions or proceedings brought against Limited

[2] While Elcock in his deposition originally claimed that he never exercised the powers given him as financial comptroller (R. 77, 86, 140, 166), he admitted that he personally arranged for all necessary financing, had the ultimate power to approve expenditures for the purchase of machinery, and personally decided whether the company was in a position to undertake government contracts, which was its only wartime activity in England (R. 167–168). He finally conceded that it was a "legal point" whether his agreement was one calculated to give him control of the company or, as he contended, one which merely made his services available to Limited (R. 168).

(R. 244). Elcock's instructions were to investigate and end the "impasse" in the affairs of SCA that had developed and to dispose of Limited's stock interest in SCA (R. 46–49, 96, 99).

That impasse had arisen because of the institution of this antitrust suit (R. 54, 99, 113); TPI's and GPE's failure and unwillingness to exploit the Scophony Inventions themselves; and TPI's and GPE's unwillingness to modify the existing arrangements so as to permit other American firms to exploit the Scophony Inventions (R. 53, 102, 103). An important feature of the complaint in the present suit is this suppression by TPI and GPE of the Scophony Inventions, both by failure and unwillingness to engage in direct exploitation of those inventions and by preventing SCA from issuing licenses to competitors in the motion picture and electronics fields (R. 11). Six different American manufacturers have at various times, beginning in October 1943, expressed an interest in obtaining a license under the Scophony Inventions, but in each case the directors representing the "B" shares owned by GPE and TPI, whose approval was necessary for the granting of such a license, were unwilling to approve (R. 54–55). Arthur Levey likewise entered into negotiations for new financing for SCA which contemplated modification of the agreements between the corporate defendants, but the required approval of the "B"

directors was not forthcoming. (R. 55). Finally, in July 1945 the "B" directors resigned; under the by-laws of SCA, this meant that there could not be a quorum of the board and that the company's affairs were at a standstill (R. 53–54, 105, 113, 195).

Limited was served with process in this proceeding by service of a copy of the summons and complaint on December 20, 1945, on defendant Arthur Levey, who sent a copy of the complaint to Limited by airmail the next day (R. 43, 50). Levey was a cofounder of Limited and one of its directors from 1936 to March 15, 1946 (R. 49). The court below appropriately described him as "the prime negotiator for Limited of the 'basic agreements' to which the Government has directed its attack" (R. 62). See also R. 121, 254. The court also pointed out that Levey consulted with Limited with respect to the proposed modifications of the class "A" stock allocations which resulted in an agreement dated February 4, 1943, whereby Limited received two-thirds of the "A" shares (R. 62). Levey also kept Limited advised of negotiations which led to SCA's employment of Dr. Rosenthal who, while employed by Limited in 1939, had purportedly invented the skiatron system of television (R. 52–53). Levey, in addition, had carried out instructions from Limited and kept Limited advised concerning the disputes between SCA's "A" and "B" directors which we have previously described (R. 62).

Levey's advice to Limited and its instructions to him took the form of numerous communications to and from Sir Maurice Bonham-Carter, chairman of the board of Limited, who requested Levey's advice and relied on his handling of Limited's interest in SCA (R. 54, 56, 117–119, 226, 247–248, 253, 255, 260, 261, 263). Limited gave to Levey an irrevocable power of attorney, dated March 26, 1945, and expiring September 30, 1945, authorizing him to vote Limited's shares in SCA (R. 247, 252).

The impasse between the "A" and "B" directors of SCA grew to such proportions that Limited authorized five other people to act on its behalf in these disputes and to assist Levey, namely, Elcock, Robert Boothby, a member of the British Parliament, Commander Arthur Mallet, an English officer, and attorneys James L. Fly and John Sloan (R. 56, 62, 255).

Limited appeared specially and moved both to dismiss the action as to it and the service of process on it, on the ground that the court lacked jurisdiction over it and that the service of process on it was insufficient to vest jurisdiction in the court (R. 45). Upon the basis of affidavits filed by the opposing parties (R. 46–58) and Elcock's deposition (R. 70–265), the district court concluded that Limited was not "present" within the jurisdiction (R. 58–63), and it therefore entered judgment dismissing the complaint and

quashing service of process as to Limited (R. 66–67).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

(1) In holding that Scophony, Limited, was not doing business in the Southern District of New York so as to bring it within that district for purposes of suit against it and service of process upon it.

(2) In entering a final judgment dismissing the complaint as to Scophony, Limited.

(3) In entering a final judgment quashing service of process as to Scophony, Limited.

SUMMARY OF ARGUMENT

I

For a foreign or alien corporation to be validly sued and served with process within a federal judicial district, it must be doing business therein of a nature substantial enough to warrant the inference that it is "found" or "present" within that district. This rule is the test of valid service both under Section 12 of the Clayton Act and under the due process clause of the Fifth Amendment. However, it is not a mechanical rule, but one that must be fitted to the distinctive facts of each case.

One distinctive feature of this case is that appellee Limited's business within the district is that of exploiting and licensing patents. Con-

sidering the nature of such a business, Limited's entry into exclusive licensing arrangements with two companies doing business within the district, who occupy dominant positions in the motion picture equipment and television fields, respectively, constitutes the doing of a substantial amount of business.

The next and perhaps the most important factor in this case is that Limited's entire business within the district has, continuously since July 31, 1942, been governed by a Master Agreement entered into between it and the two dominant concerns mentioned above. That Agreement called for the doing of business within the district, and for Limited's engaging in various business activities within the district. Also it involved Limited's availing itself of the privileges and benefits of the patent, contract, and corporation laws of the United States and of New York, the state of the forum. Finally, the Master Agreement was the main basis of the present antitrust proceeding against Limited. That proceeding cannot be satisfactorily concluded unless the judgment entered therein terminates the Agreement and requires Limited to divest itself of its stock interest in a Delaware corporation, also doing business within the district, which is the corporate instrumentality of that illegal Agreement. In sum, the Master Agreement of July 31, 1942, was of such comprehensive scope and continuity and so completely circumscribed and regulated Limited's doing of

business in the district as to, by itself, justify the conclusion that Limited was "found" in the district.

The Master Agreement also provided for the subsequent formation of a corporate subsidiary, SCA, which was to be owned and controlled by Limited and the two American firms that had entered into the Master Agreement with Limited. The main basis for the decision of the court below was its reliance on precedents which might have been applicable to a corporate subsidiary wholly owned and controlled by Limited and in actual fact acting as an agent for Limited. In this case, however, the two American firms had and exercised a "veto power" over SCA's activities; SCA was not in fact an agent of Limited, but rather the corporate instrumentality of the illegal cartel arrangement among its three incorporators; and SCA did not effectuate the objectives of Limited within the district, because its American corporate stockholders exercised their veto power. Limited therefore had to and did rely on individual agents (including its representatives on SCA's board of directors) for the effectuation of its business objectives within the district. Limited's reliance on individual agents to act for it within the district is evidenced by the actual naming of such agents as directors and officers of SCA before SCA had been created; the efforts of those individual agents to spur SCA into

more active operation; and the activities of six different individual agents in trying to negotiate a settlement of the impasse between Limited and the American stockholders of SCA.

II

The constitutional standards of venue and service of process set forth in *International Shoe Company* v. *Washington,* 326 U. S. 310, are applicable to Section 12 of the Clayton Act. The *International Shoe* case merely restates, in more specific and less mechanical and quantitative terms, the general rule that venue and service of process is dependent on corporate presence in a jurisdiction, as stated in *Peoples Tobacco Company, Limited* v. *American Tobacco Company,* 246 U. S. 79, and the beginning of Argument I. The standards of Section 12 of the Clayton Act are the same as those of constitutional due process. This conclusion is supported by the practice of the courts themselves, and by the necessity for giving effect to the broad public policy of the Sherman Act. Furthermore, Section 12 was intended to be a liberalizing venue and service of process statute. To hold that its standards are narrower than those of constitutional due process would be to make its policy more restrictive than that obtaining generally in the federal courts.

ARGUMENT.

I

SCOPHONY, LIMITED, WAS DOING A SUBSTANTIAL BUSINESS IN THE NEW YORK DISTRICT AND WAS "FOUND" THEREIN, WITHIN THE MEANING OF BOTH THE LANGUAGE OF SECTION 12 OF THE CLAYTON ACT AND THE LIMITATIONS IMPOSED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The general rule governing venue and service of process against a foreign corporation, both under Section 12 of the Clayton Act and under the due process clause of the federal Constitution, is that a foreign corporation may be sued or served in a jurisdiction if it is "found" or "present" therein; and it is "found" or "present" within a jurisdiction if it does business therein "of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *Peoples Tobacco Company, Ltd.* v. *American Tobacco Co.*, 246 U. S. 79, 87; *St. Louis Railway Co. of Texas* v. *Alexander*, 227 U. S. 218, 227; *Consolidated Textile Co.* v. *Gregory*, 289 U. S. 85.

The court below correctly stated this general rule (R. 60), but, we believe, it did not correctly apply the rule to the case before it. This was because the court did not, in our judgment, take adequate account of the distinctive nature of Limited's business activities within the district, and also because the court failed to appraise the

facts as to such business activities in a sufficiently "non-quantitative" and "non-mechanical" way. See *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 583; *International Shoe Co.* v. *Washington*, 326 U. S. 310, 319; *Industrial Research Corp.* v. *General Motors Corp.*, 29 F. (2d) 623, 626 (N. D. Ohio).

The court below stated that, by the early part of 1942, Limited had ceased to be "actively engaged in placing its product in the American market" (R. 60–61). It then looked to the subsequent activity of SCA, the corporate subsidiary of Limited, to determine whether this constituted the doing of business by Limited within the district. The court concluded that SCA did not differ from any ordinary corporate subsidiary, except possibly for the fact that Limited received 50% of the royalties earned by it (R. 62). It also decided that SCA had not acted as an agent for Limited, except that on occasion it had purchased certain materials and equipment in the United States for Limited (*ibid.*). Relying on a general legal doctrine that the doing of business by a corporate subsidiary is not the doing of business by its parent, the conduct of SCA was not, in the court's view, sufficient to inject Limited, its parent, into the jurisdiction (R. 61–62).

With respect to the activities of Limited's individual agents, the court noted Levey's activities as a negotiator of the Master Agreement of July

31 and the agreements supplemental thereto; his consultations with Limited concerning modification of the "A" stock allocations and SCA's employment of the inventor Rosenthal; and Levey's activities and those of others in connection with the settlement of disputes between the class "A" directors, representing Limited, and the class "B" directors, representing GPE and TPI (*ibid.*). The court viewed these activities as involving the conduct of SCA's business and protection of Limited's interest therein, but as not involving the business of manufacturing, selling, and licensing television apparatus, which, the court said, was the business in which Limited was engaged (*ibid.*).

The district court's analysis, we think, ignored some factors entirely and misconstrued the significance of others. In the first place, the court gave no consideration to the fact that Limited's business in the New York district currently was the exploitation and licensing of the Scophony Inventions by and to others, rather than itself manufacturing or selling products embodying those inventions. Furthermore, Limited's subsidiary, SCA, was a patent holding company empowered to license those inventions but not empowered to manufacture or sell products made thereunder.

Second, the court gave inadequate recognition to the Master Agreement of July 31, 1942, which not only provided for the formation of SCA, but also dictated the entire framework of Limited's subse-

quent business in the United States. The Master Agreement was entered into with two corporations doing business in the New York district and called for the doing of business within that district. It involved Limited's taking advantage of the privileges and benefits of the patent, contract, and corporation laws of the United States and of the State of New York. In addition, the agreement resulted in the institution of the present proceeding charging violation of the antitrust laws, a proceeding which, in the Government's view, cannot be satisfactorily brought to a conclusion unless the judgment entered by the court terminates the agreement and requires Limited and the other defendants to divest themselves of their stock in SCA, the corporate instrumentality of that agreement.

Third, the court ignored the fact that, because GPE and TPI, co-conspirators of Limited's and of SCA, had and exercised a "veto power" over SCA's activities, SCA never succeeded in carrying out Limited's objectives in the United States. Consequently, the acts which are determinative of whether Limited was doing business within the jurisdiction were not the acts of SCA, but rather the acts of Limited's representatives on SCA's board of directors and of other agents of Limited who dealt with SCA. We also point to business activities of Limited within the domestic jurisdiction which could not be performed by SCA or Limited's agents on SCA's board, but required Limited's active intervention.

Finally, we feel that the court did not draw the correct inferences from the existence of the disputes between Limited and GPE and TPI, and from the activities of Limited's agents in attempting to adjust these disputes. Settlement of those disputes involved, not merely putting SCA's affairs in order, but also determination of the way in which Limited's Scophony Inventions would be developed in this country and the nature of the reward to be received by Limited from that development. Moreover, the settlement negotiations, like the disputes out of which they arose, went to the root of this antitrust proceeding against Limited and its co-conspirators, and involved still further acts by Limited within the jurisdiction of the court below.

In succeeding sections of the Argument, these factual considerations are developed in greater detail. To the extent that the facts establish Limited to be "found" within the district, they satisfy both the service of process and the venue provisions of Section 12 of the Clayton Act. Under Section 12 there is venue in the court if the defendant is either "found" or "transacts business" within the judicial district, whereas the Section permits service of process only in a district in which the defendant is "found." The venue provision is more easily satisfied because the mere transaction of business by a corporation within the judicial district lays the basis for venue

in the court. A foreign corporation may be validly served with process in a district, if it "'transacts business' therein of any substantial character." *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 373; *Haskell* v. *Aluminum Company of America*, 14 F. (2d) 864, 867, 869 (D. Mass.); *Northern Kentucky Telephone Co.* v. *Southern Bell Telephone & Telegraph Co.*, 54 F. (2d) 107 (E. D. Ky.). The venue provision, however, is satisfied if the defendant merely "transacts business" within the district. See *Eastman Kodak Co.* v. *Southern Photo Materials Co., supra*, at pp. 372–373; *Hansen Packing Co.* v. *Armour & Co.*, 16 F. Supp. 784, 786 (S. D. N. Y.); *Haskell* v. *Aluminum Company of America, supra*, at p. 867; *Jeffrey-Nichols Motor Corp.* v. *Hupp Motor Car Corp.*, 46 F. (2d) 623, 624, (C. C. A. 1).

A. SCOPHONY, LIMITED, HAS BEEN AND IS ENGAGED IN THE NEW YORK DISTRICT IN THE BUSINESS OF PATENT DEVELOPMENT AND EXPLOITATION

(1) *Limited's business was patent exploitation.*—While the business upon which Limited originally embarked in the New York district was that of manufacturing and selling in the American market devices on which it held patents, it found itself without sufficient funds to continue direct manufacture and sale (*supra*, pp. 5, 6). It accordingly abandoned this particular method of doing business and undertook the exploitation of the Scophony Inventions in partnership with American concerns having greater financial re-

sources. This change in the character of the company's business does not mean that, after the change occurred, Limited ceased to do business in the New York district. The licensing of its inventions, the transmission and exchange of information relating to use of these inventions, and the receipt and transmission of royalties in connection with patent licensing, was, we submit, no less a "doing of business" than, let us say, the issuance of insurance policies.

While the commercial exploitation of inventions is, therefore, the doing of business, the incidents of such a business differ from those of the ordinary manufacturing and selling business with which most of the relevant cases are concerned. The distinguishing feature in the successful operation of the former type of business is not multiplicity of transactions, but continuity and regularity of business program. For the carrying on, within a particular jurisdiction, of the business of a patent-holding and development company, it is not necessary that the company maintain an office, agency or warehouse in the jurisdiction; or own any real estate or other physical property therein; or make any sales or solicit any orders; or engage in any of the other usual activities characteristic of a manufacturing or sales organization. Cf. *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Meyer*, 197 U. S. 407, 409, 414; *LaPorte Heinekamp Motor Co.* v. *Ford Motor Co.*, 24 F. (2d) 861 (D. Md.); *Jeffrey-*

Nichols Motor Corp. v. *Hupp Motor Car Corp.*, 46 F. (2d) 623, 625 (C. C. A. 1). A corporation engaged in exploiting its patent position and research resources in the television field need do no more than what Limited has done in this case, i. e., enter into licensing arrangements with large-scale manufacturers. When Limited gave two dominant concerns, doing business in New York City, exclusive rights to exploit its Scophony Inventions (*supra*, pp. 8, 9), it no more took itself out of the doing of business in that city than would be the case if a concern granted an exclusive sales territory therein to a single individual. Cf. *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 70 F. Supp. 77, 91–94 (S. D. N. Y.); *Rendelman* v. *Niagara Sprayer Co.*, 16 F. (2d) 122 (E. D. Ill.).

(2) *The Master Agreement of July 31, 1942.*— We submit, further, that the execution by Limited of the Master Agreement of July 31, 1942, and of the two attached implementing agreements were acts of such pervasive and continuing significance as, single-handedly, to bring about Limited's continued "presence" within the jurisdiction. They completely regulated and circumscribed the extent and manner of Limited's exploitation of the Scophony Inventions in the United States. By their mere existence, six other manufacturers interested in doing business under the Scophony Inventions were excluded from doing so. By virtue of them, Limited excluded

itself from direct manufacture and sale on the American television equipment market. The effect of these agreements in frustrating utilization and exploitation of the Scophony Inventions in this country is a basic element of the charges of law violation made in the present proceedings (*supra*, pp. 10, 11). Looking at the economic and legal ramifications of these agreements in a "non-mechanical" and "non-quantitative" way (see *supra*, p. 21), they were, "because of their nature," the kind of single acts which "may be deemed sufficient to render the corporation liable to suit." See *International Shoe Company* v. *Washington*, 326 U. S. 310, 318; *Frene* v. *Louisville Cement Company*, 134 F. (2d) 511, 515 (App. D. C.); *Empire Fuel Co.* v. *Lyons*, 257 Fed. 890 (C. C. A. 6); *Beach* v. *Kerr Turbine Co.*, 243 Fed. 706, 711 (N. D. Ohio); cf. *Hess* v. *Pawloski*, 274 U. S. 352.

(3) *Limited's enjoyment of rights and powers conferred by American law.*—By virtue of its Master Agreement with GPE and TPI, Limited took full advantage of the benefits and privileges conferred by the patent laws of the United States, the corporation laws of New York and Delaware, and the contract law of New York. Limited was making strenuous efforts to resolve its disputes with the American incorporators of SCA and to protect its stockholders' interest in SCA (*supra*, pp. 12–15), and achievement of these ends would,

in the view of the parties, necessitate further recourse to domestic law. It would be anomalous if an alien corporation, which thus availed itself of rights and powers conferred by federal and state law for carrying out a business undertaking within the jurisdiction of the district court, could not be sued in that court on contracts made by it and to be performed by it within that jurisdiction. See *Railroad Company* v. *Harris,* 12 Wall. 65, 83, 84; *St. Clair* v. *Cox,* 106 U. S. 350, 355; *Henrietta Mining & Milling Co.* v. *Johnson,* 173 U. S. 221; *United States* v. *Pacific Forwarding Co.,* 8 F. Supp. 647, 652, 653 (W. D. Wash.).

(4) *Limited's business violated the antitrust laws.*—The inappropriateness and undesirability of having an alien corporation immune from suit is manifest in a situation like this one, where the corporation's conduct has involved a continuing violation of the antitrust laws, where such illegal conduct has consisted so directly and entirely of business transacted by it within the jurisdiction in which it is sued, and where its corporate partners in the conspiracy charged as being illegal are also found within the jurisdiction and doing business therein (see *supra,* pp. 6–11). Whether a foreign corporation may be subjected to suit may depend in large measure on the relationship of the business done by it to the cause of action

asserted against it.[3] "A corporate defendant who is enough in the state or district there to wrong some one should be held to be enough in the state or district to be there answerable for what it has there wrought." *Frey & Son* v. *Cudahy Packing Co.*, 228 Fed. 209, 213 (D. Md.). To combine with others in the district to suppress competition and to secure a monopoly in a field of business, which is what Limited has done, may be an illegal business activity, but it is nonetheless business activity that is actionable. See *Giusti* v. *Pyrotechnic Industries, Inc.*, 156 F. (2d) 351 (C. C. A. 9), certiorari denied, 329 U. S. 787; *Jeffrey-Nichols Motor Corp.* v. *Hupp Motor Car Corp.*, 46 F. (2d) 623 (C. C. A. 1).

We therefore submit that the judgment here should be similar to what it was in the closely parallel case of *Dobson* v. *Farbenfabriken of Elberfeld Company*, 206 Fed. 125 (E. D. Pa.). That case involved the application of Section 7 of the Sherman Antitrust Act (a precursor of Section 12 of the Clayton Act), and concerned the creation by the defendant German corporation of a New York corporation for the precise pur-

[3] See *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312, 316, 317; *Mutual Life Insurance Company* v. *Spratley*, 172 U. S. 602; *La Porte Heinekamp Motor Co.* v. *Ford Motor Co.*, 24 F. (2d) 861, 864 (D. Md.); *Rendelman* v. *Niagara Sprayer Company*, 16 F. (2d) 122 (E. D. Ill.); *Farmers' & Merchants' Bk.* v. *Fed. Reserve Bk.*, 286 Fed. 566, 590–591 (E. D. Ky.). But cf. *Rosenberg Bros. & Co., Inc.* v. *Curtis Brown Co.*, 260 U. S. 516; *Davega* v. *Lincoln Furniture Manufacturing Co.*, 29 F. (2d) 164, 166 (C. C. A. 2).

pose of effectuating an illegal international cartel agreement. Except for the fact that the *Dobson* case involved a sales subsidiary and the instant case involves a patent development subsidiary, the factual situations are identical. The court in the *Dobson* case held (p. 128) that the German corporation was found within the jurisdiction because it carried "on through the New York Company as its agent the very business which is charged in the statement of claim to have been conducted in violation of the act of Congress."

A more recent case, *United States* v. *U. S. Alkali Export Assn.* (S. D. N. Y.), decided July 16, 1946,[4] analyzed the relevant facts in greater detail and reached a similar conclusion. The court there held that a British corporation was found within its jurisdiction because of the activities of one of its subsidiaries domiciled in New York. This subsidiary had acted as a medium for negotiations and correspondence with American business firms which had entered into contracts (alleged to violate the antitrust laws) with the British parent. Operation of what the court termed a "liaison office" or "commercial legation" of the British parent was held to be the doing of sufficient business to make the British company liable to service of process.[5]

[4] The Government is filing copies of this opinion, which has not been reported, with the Clerk of this Court.

[5] Cf., under a cognate process statute, the converse situation where the Court concludes that the alien subsidiary of an American parent is "found" within the judicial district, *S. E. C.* v. *Minas De Artemisa, S. A.*, 150 F. 2d 215 C. C. A. 9).

There has been a growing tendency for corporations doing an international business to carry on their business in a foreign country in the form of separately incorporated subsidiaries. See Liefmann, *Cartels, Concerns and Trusts,* 244, 265 (1925); Bonsal and Borges, *Limitations Abroad on Enterprise and Property Acquisition,* 11 Law and Contemporary Problems 720, at 737–738 (1946). The relief against Limited in this action, which the Government envisages as essential, includes not only injunctive prohibitions against Limited, but divestiture of its interest in SCA, possible dissolution of SCA, and relief against the patents and other rights under the Scophony Inventions currently held by SCA (R. 13). Since Limited had originally contributed these inventions to SCA and has at least as much of an interest in them as any of its American partners, the presence of a corporate subsidiary in this country should not blind us to the fact that Limited exercised at least partial control over the subsidiary's operations and has thereby been in a position to obstruct the public policy embodied in the antitrust laws of the United States. To give recognition to such facts does not, we submit, mean ignoring the separate corporate entity of SCA; it represents, rather, a recognition of the extent to which Limited has itself functioned within the local jurisdiction.

(5) *Acts within the district performed by Limited itself.*—We shall not burden the Court with a detailed enumeration of the numerous acts

which, under the 1942 basic agreements, were to be performed by Limited within the district court's jurisdiction. In summary, these further business activities impinging on the jurisdiction of the court below included such matters as the giving by Limited of further patent information and technical data to SCA; the receipt by Limited of patent information and technical data emanating from GPE and TPI; the receipt by Limited of royalties from SCA; and the transfer of the inventor Rosenthal from Limited's pay roll to SCA's pay roll. See *supra*, pp. 8, 9, 16, 21, 22; R. 256-257. All of these activities were ignored by the court below.

B. SCOPHONY, LIMITED, HAS BEEN CONTINUOUSLY CARRYING ON SUBSTANTIAL BUSINESS WITHIN THE NEW YORK DISTRICT THROUGH INDIVIDUAL AGENTS

Judge Learned Hand has well said, in connection with the law as to when a foreign corporation is found in a jurisdiction, that "we must step from tuft to tuft across the morass." See *Hutchinson* v. *Chase & Gilbert*, 45 F. (2d) 139, 142 (C. C. A. 2). Nowhere is this more true than in dealing with the conflicting inferences which the courts have drawn from the presence of a subsidiary of a foreign corporation within the domestic jurisdiction. A careful examination of the facts of this case leads, we think, to the conclusion that the path across the morass followed by the court below is an irrelevant one—a profitless detour; and that there is solid highway to travel for one who follows the facts.

We do not here ask this Court to abandon the orthodox view that the corporate separation between Limited and SCA, "though perhaps merely formal, was real," and was not "pure fiction". See *Cannon Mfg. Co.* v. *Cudahy Co.* 267 U. S. 333, 337. For the purposes of this case, if we are dealing with a corporate fiction, we are prepared to deal with it as "a fiction created by law with intent that it should be acted on as if true," see *Klein* v. *Board of Supervisors,* 282 U. S. 19, 24. We are, however, asking this Court to look at the facts before it and "not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact," see *McDonald* v. *Mabee,* 243 U. S. 90, 91. Fair play, we wish to repeat, has not been in any way denied Limited in this proceeding, which is being sued on activities centered within the judicial district and has had actual notice of this proceeding. We are anxious only that fair play not be denied the domestic competitors of Limited and the public, whose injuries cannot be made good except by relief directed against Limited.

SCA started its corporate existence as the instrumentality not only of Limited, but also of two other large corporations, GPE and TPI, which had behind them the powerful financial resources of the Paramount and Fox film interests (*supra,* pp. 6, 7). By the time this proceeding was instituted and process served, it was clear that Limited's intentions respecting SCA had been frustrated and that SCA, whatever its legal rela-

tionship to Limited might be, was in actual fact not then acting as Limited's agent. Limited's inability to rely on SCA for the accomplishment of its business objectives made it necessary for it to call on the services of *individual* agents like Levey, Elcock and others, and to inject itself, through these agents, into the New York jurisdiction.

Under such circumstances it is unnecessary to decide whether, as the court below felt, SCA was a formally separate and distinct entity from Limited, the acts of which could not be regarded as those of its British parent (see *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333; *Consolidated Textile Co.* v. *Gregory*, 289 U. S. 85), or whether, on the other hand, Limited, as a parent enjoying the fruits of its subsidiary's activity, should be held responsible for the acts of its corporate agent or adjunct (see *Detroit Motor Appliance Co.* v. *General Motors Corp.*, 5 F. Supp. 27, 30-31 (E. D. Ill.); *Industrial Research Corp.* v. *General Motors Corp.*, 29 F. (2d) 623, 626, 627 (N. D. Ohio); *United States* v. *U. S. Alkali Export Assn.* (S. D. N. Y.), *supra*).

Limited's reliance on individual agents as well as the corporate agency of SCA was evident even before SCA was formed, when there was written into the Master Agreement of July 31, 1942, the names of the officers and directors who were to be Limited's representatives in SCA (R. 15). When it became clear that GPE and TPI would

not permit SCA to function as Limited's agent, Limited continued to act within the jurisdiction through Arthur Levey and its other representatives and agents on SCA's board of directors. See *supra*, pp. 7, 13, 14.

The court below ignored the repeated efforts of Limited's individual agents within the jurisdiction to spur its inactive subsidiary into more active operation. In so doing, it ignored a factor analogous, in the context of a patent exploitation enterprise, to the solicitations of orders and contracts in the case of foreign sales companies. Such solicitations have been considered in great measure determinative of whether a foreign corporation is found within a domestic jurisdiction. See *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *Frene* v. *Louisville Cement Co.*, 134 F. (2d) 511 (App. D. C.). In essential economic outline, Limited was maintaining, through its representatives on the Board of SCA, a "liaison office" and an agency for the solicitation of business within the jurisdiction. See *Hutchinson* v. *Chase & Gilbert*, 45 F. (2d) 139, 141 (S. D. N. Y.); *United States* v. *U. S. Alkali Export Assn.*, *supra*. Limited's solicitations of new manufacturers to exploit the Scophony Inventions is, in our view, corroborative evidence that Limited was present within the jurisdiction, that presence having been established in the first place by Limited's continuing arrangements with GPE and TPE.

The court below likewise ignored the continuous efforts of Limited, through six different individual agents, to negotiate a settlement of the impasse between it and GPE and TPI. The facts with respect to that impasse have been previously set forth in some detail (*supra*, pp. 12–15). We wish to point out here only that the impasse could not be resolved without settling this antitrust proceeding (R. 198, 205); that Elcock's power of attorney extended to the compromise by Limited of this lawsuit or the entry of a default judgment against it (R. 244); and that the existence of the disputes between Limited and its corporate partners, and the negotiations for their adjustment, made it necessary for Limited to inject itself affirmatively into the jurisdiction. A foreign corporation's involvement in disputes and negotiations for their settlement, such as these, have long been recognized by the courts as a basis for deciding that the foreign corporation was "found" within the jurisdiction so that it could properly be sued and served with process therein. *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Pennsylvania Lumbermen's Mutual Fire Ins. Co.* v. *Meyer*, 197 U. S. 407; *St. Louis S. W. Ry. Co. of Texas* v. *Alexander*, 227 U. S. 218; *Hutchinson* v. *Chase & Gilbert, supra*, at p. 142; *Geo. Wm. Bentley Co.* v. *Chivers & Sons, Ltd.*, 215 Fed. 959 (S. D. N. Y.).

II

THE STANDARDS OF VENUE AND SERVICE OF PROCESS APPLICABLE TO DEFENDANT SCOPHONY, LIMITED, ARE THE CONSTITUTIONAL STANDARDS SET FORTH BY THIS COURT IN *INTERNATIONAL SHOE COMPANY* v. *WASHINGTON*, 326 U. S. 310

We have, in the preceding section of this argument (see p. 20, *supra*), indicated that the same general concept, i. e., corporate presence within a jurisdiction, determines whether a foreign corporation has been validly served with process both under Section 12 of the Clayton Act and, independently of statute, under the due process clause of the Constitution. In this section we wish to establish that "corporate presence" has the same meaning in both contexts and that Section 12 standards of venue and service of process are in fact the same as those of constitutional due process, as most recently set forth by this Court in *International Shoe Co.* v. *Washington*, 326 U. S. 310. Although that case was concerned with the constitutional authority of the states, it cited without differentiation *People's Tobacco Co., Ltd.* v. *American Tobacco Co.*, 246 U. S. 79, a case under a federal venue statute which is the leading case stating the test in its customary terms (see p. 20, *supra*), and cases involving the constitutional power of the states under the due process clause. The *International Shoe* case appears to substitute, for a mechanical and quantitative approach to the problem of corporate presence within a jurisdiction, a more practical test, under which venue may be established against a foreign corpo-

ration if the forum has sufficient contacts with the corporate activity so that an unreasonable burden is not imposed upon the corporation in defending a suit therein. See 326 U. S. at 317. Service of process may be made against a foreign corporation if there is reasonable assurance that such service will convey actual notice of the pendency of the proceeding against the corporation.[5]

[5] There is some doubt whether Section 12 of the Clayton Act applies to alien corporations. This Court said, with respect to the federal statute governing venue suits generally when it was in a form almost identical with that of Section 12 of the Clayton Act, that, if it "*could have been* treated as extending the provision to suits against aliens, it *could only* be by virtue of the clause permitting defendants to be sued in the district in which they were found." [Italics supplied.] *In re Hohorst*, 150 U. S. 653, 661. The statute referred to provided that no civil suit could be brought "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 79; Rev. Stat. § 739, as amended by the Act of March 3, 1875, 18 Stat. 470, c. 137, § 1, and prior to the Act of March 3, 1887, 24 Stat. 552. The special venue statute relating to patent infringement suits, which is somewhat analogous to Section 12 of the Clayton Act, has specifically been held inapplicable to alien corporations in the lower courts, on the authority of *In re Hohorst*. See *United Shoe Machinery Co.* v. *Duplessis Independent Shoe Machinery Co.*, 133 Fed. 930 (D. Mass.); *Sandusky Foundry & Machine Co.* v. *De Lavaud*, 251 Fed. 631 (N. D. Ohio) and the discussion on page 42, *infra*. We are not pressing this point, however, because of our feeling that Section 12 standards are the same as those of constitutional due process, as set forth in the *International Shoe* case, which we believe adequate to protect both the government's and Limited's appropriate interests. There is no case passing directly on whether the general federal venue statute, when it was in the form above referred to, applied to alien corporations.

The courts have not undertaken to distinguish between the constitutional content of "corporate presence" and its statutory content under Section 12 of the Clayton Act. They have, when dealing with the meaning of "corporate presence" or of the word "found" in a specific statute, relied on cases involving different statutory or constitutional contexts as apposite precedents. Thus in the *International Shoe* case, this Court relied, without apparent distinction, on prior decisions involving the due process clause of the 14th Amendment, the diversity jurisdiction of the federal courts, and venue provisions applicable to the Sherman Act. Conversely, in the *People's Tobacco* case, a case based on Section 7 of the Sherman Act,[8] the Court relied on precedents dealing with the validity of state judicial action under the due process clause of the Constitution.

[8] Section 7, the venue provision applicable to treble damage suits by private parties for violations of the Sherman Act, authorizes suit "in any district court of the United States in the district in which the defendant resides or is found" (26 Stat. 210; 15 U. S. C. Section 15). In its application to defendant corporations, Section 7 does not differ from the service of process provisions of Section 12 of the Clayton Act. Both th word "resides," as used in Section 7 (*Southern Pacific Company* v. *Denton*, 146 U. S. 202; *Seaboard Rice Milling Company* v. *Chicago, Rock Island & Pacific Railway Company*, 270 U. S. 363), and the word "inhabitant" used in Section 12 of the Clayton Act (*Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *G. H. & S. A. Ry. Co.* v. *Gonzales*, 151 U. S. 496), refer, in the case of corporations, to judicial districts within the state of their incorporation.

Also supporting the identity between the constitutional and statutory connotations of the word "found" is the fact that, when Congress enacted the Clayton Act, it presumably used words as they were then defined by the courts. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59. The word "found" was then being defined by the courts very largely in a constitutional context. See *Haskell* v. *Aluminum Company of America*, 14 F. (2d) 864, 867 (D. Mass.) and cases cited; *Deutsch* v. *Times Publ. Corp.*, 33 F. Supp. 957 (S. D. N. Y.). Furthermore the constitutional generality and adaptability of the substantive provisions of the Sherman Act (see *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 359, 360) and the broad policy of that Act argue for giving the venue and service of process provisions applicable to proceedings brought under it the maximum liberality of interpretation compatible with constitutional safeguards.

If Section 12 of the Clayton Act is considered in the light of cognate federal statutes relating to venue and service of process, the conclusion that its standards are the same as the relevant constitutional standards is reinforced. Like the other statutes governing venue and service of process under the antitrust laws, Section 12, it may be noted, is in the nature of a specific exception to the general statute governing venue and service of process in the federal courts, which assumed its present form in 1888 (Section 51 of the Judicial Code, 28 U. S. C.

112.)[7] The same cases that held this statute not to apply to alien corporations, on the ground that such corporations were not "inhabitants" of a federal judicial district, held them to be suable and liable to service of process in any district where valid service could be had. *In re Hohorst*, 150 U. S. 653, 662; *Jarowski* v. *Hamburg-American Packet Co.*, 182 Fed. 320 (C. C. A. 2); *G. H. & S. A. Ry. Co.* v. *Gonzales*, 151 U. S. 496, 503, 506, 514 (dissent); *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, 112. The specific statutory provision governing venue and service of process in patent infringement proceedings, which was enacted in 1897 (and which was similar to Section 12 of the Clayton Act),[8] has like-

[7] Section 11 of the Judiciary Act of 1789, 1 Stat. 79, R. S. Section 739, provided that no civil suit should be brought "against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." The Act of March 3, 1875, 18 Stat. 470, substituted the words "against any person" for the words "against an inhabitant of the United States." R. S. 739 was again amended in 1887 and 1888 (24 Stat. 552, 25 Stat. 434) so as to provide that "no civil suit shall be brought * * * against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." This provision is now embodied without further change in Section 51 of the Judicial Code, 28 U. S. C. Sec. 112.

[8] Section 48 of the Judicial Code (28 U. S. C. Section 109) adopted on March 3, 1897, reads as follows: "In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the *district of which the defendant is an inhabitant, or in any district in which the defendant*, whether a person, partnership, or corporation *shall* have committed acts of infringe-

wise, on the authority of *In re Hohorst*, been held inapplicable to alien corporations. See *United Shoe Machinery Co.* v. *Duplessis Independent Machinery Co.*, 133 Fed. 930 (D. Mass.); *Sandusky Foundry & Machine Co.* v. *De Lavaud*, 251 Fed. 631 (N. D. Ohio). Absent statutory standards under these two statutes, the only available standards for venue and service of process are constitutional ones.

It would be a strange consequence if the special venue and service statutes for antitrust cases were designed, or interpreted, to make it more difficult to reach alien corporations violating the antitrust laws than would have been the case if the general law, which for alien corporations was the constitutional standard, had governed. It seems clear that Section 7 of the Sherman Act and Section 12 of the Clayton Act were meant to incorporate a broader test than that of "inhabitant" contained in Section 51 of the Judicial Code, inasmuch as both of the former sections permits suit in any district in which the defendant may be "found."[9] Indeed, when in *Peoples Tobacco Co., Ltd.* v. *American Tobacco Co.*,

ment and *have a regular and established place of business.* If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought." (The italicized words show the similarity of this statute and Section 12 of the Clayton Act.)

[9] See *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 623.

246 U. S. 79, the Court interpreted the word "found" as used in Section 7 of the Sherman Act it relied upon cases establishing constitutional due process standards for the states, which were in fact the primary sources of information available to Congress as to the meaning of "found" in that context when it enacted the special statutory provisions applicable to Sherman Act proceedings.

The policy considerations that influenced the courts in dealing with alien corporations under Sections 51 and 48 of the Judicial Code apply to Sherman Act proceedings, probably with increased force. An alien corporation can not only sue a United States citizen in any district where the defendant resides on general causes of action, but it is given the specific power to sue domestic businesses in the federal district courts to recover treble the damages to it caused by such persons' violation of the antitrust laws. Cf. *United States* v. *Bedouin S. S. Co., Ltd.*, 167 Fed. 863, 866 (S. D. N. Y.). We have already cited the cases that support the view that venue and amenability to process are a legitimate consequence of the great benefits that a foreign corporation obtains under the laws of the forum (see pp. 28–9, *supra*). It is therefore only fair that alien corporations which violate the Sherman Act in this country should not be exempt from suit. Cf. *Lafayette Insurance Co.* v. *French*, 18 How. 404. The purpose of a venue statute is to regulate and distribute jurisdiction among the respective judicial districts of the United States, not to an-

nul and defeat that jurisdiction or immunize defendants from the operation of the laws of the United States. See *In re Hohorst*, 150 U. S. 653, 660; 3 Hughes, *Federal Practice, Jurisdiction and Procedure*, 327. Even if one could enforce the antitrust laws extraterritorially, one should not have to go to the courts of another nation to enforce a statute of the United States or of a state of the union. See also *Geo. Wm. Bentley Co.* v. *Chivers & Sons*, 215 Fed. 959, 962 (S. D. N. Y.); *Fisher* v. *Canadian Pacific Ry. Co.*, 1 F. Supp. 235, 237 (W. D. N. Y.).

We wish to stress our conviction that Limited's activities within the district would constitute corporate presence within the jurisdiction even if it were a foreign corporation, i. e., incorporated in some other state of the union than the forum. While the rules as to venue and service of process on foreign and alien corporations, respectively, may be identical, different facts, however, may fit the uniform rule. Thus, with respect to venue, the *International Shoe* case requires that the defendant foreign corporation and the transactions in which it was involved maintain certain minimum contacts with the forum, so that the maintenance of the suit does not "offend traditional notions of fair play and substantial justice." This Court, in that case, cites with approval the language of Judge Learned Hand in *Hutchinson* v. *Chase & Gilbert*, 45 F. (2d) 139, 141 (C. C. A. 2), to the effect that the end served by a venue statute is the balancing of the hardships caused the plaintiff and defendant in a case, re-

spectively, by the selection of alternative forums. Where the government is the plaintiff in an antitrust proceeding and the alternative is that the defendant entirely escapes liability for unlawful conduct within the United States, a strong burden of proving complete absence from the jurisdiction rests on the defendant, particularly when there is no claim that there would be less hardship in any other United States judicial district.

As to service of process the basic consideration is to provide adequate notice to the defendant. *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 269. Here again, there is a possibility, albeit a lesser one, that the courts will consider different facts relevant to the adequacy of the notice received by an alien corporation, and a foreign corporation, respectively. But in this case, appellee received adequate notice under any standard.

There is present in this case no conflict between the necessities of effective enforcement of the antitrust laws and the equally significant legal policy of suing defendants in a forum where it is fair to sue them and upon notice that is adequate. The conclusion that the standards set forth in *International Shoe Co.* v. *Washington*, 326 U. S. 310, apply here and have been met does not impair any legitimate right or appropriate interest of defendant Scophony Limited. At the same time, however, the conclusion that these standards are applicable under Section 12 will remove confusion that has in the past hindered effective antitrust enforcement.

CONCLUSION

For the reasons previously stated, it is respectfully submitted that the judgment of the court below should be reversed.

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